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No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

PACECO, INC.,

Petitioner,

vs.

WILLIAM SMITH and TOKIO MARINE AND FIRE INSURANCE COMPANY, LTD.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, DISTRICT TWO, DIVISION FIVE

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QUESTIONS PRESENTED

1. Does a state's common law rule of joint and several liability requiring a defendant found to be only 5 percent responsible for a plaintiff's damages to pay 75 percent of the damages to a plaintiff who was himself 25 percent at fault amount to an unconstitutional taking of property or a denial of due process and equal protection of the law in violation of the Fifth and Fourteenth Amendments of the United States Constitution?

2. Does the Longshoremen's and Harbor Workers' Compensation Act, when it intersects with a state rule of joint and several liability, result in an unlawful taking of property or a violation of due process or equal protection of the law in violation of the Fifth Amendment if construed to deny a third party tortfeasor credit for compensation payments made on behalf of a negligent employer?

LIST OF PARTIES/RELATED ENTITIES

1. All parties to the proceeding in the court whose judgment is sought to be reviewed are listed in the caption.

2. Paceco, Inc. is a wholly-owned subsidiary of Fruehauf Corporation, which also has other subsidiaries.

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PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, DISTRICT TWO, DIVISION FIVE

—o—

Petitioner Paceco, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, Second District, Division Five entered herein on December 4, 1986.

—o—

OPINIONS BELOW

The opinion of the California Court of Appeal, Second District, Division Five was not certified for publication; it is reprinted in the appendix hereto, *infra*.

The California Supreme Court's order of February 25, 1987, denying review is unpublished; it is reprinted in the appendix hereto, *infra*.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(3).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides in relevant part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment of the United States Constitution provides in relevant part;

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Longshoremen's and Harbor Workers' Compensation Act provides in 33 U.S.C. section 905, subdivisions (a) and (b):

"The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title."

"In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was

the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

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STATEMENT OF THE CASE

A. Summary Of Material Facts.

International Transportation Service (ITS) operated a container storage facility under an arrangement with the City of Long Beach, storing containers (basically large metal boxes, approximately 40 feet long and 13 feet high) used for long distance freight transportation. These containers were lifted by a large overhead gantry crane called a Transtainer (a registered trademark of Petitioner Paceco, Inc.). The Transtainer operator's cab is on a trolley about 50 feet off the ground, with the hoisting mechanism. The Transtainer typically operates in a semi-stationary manner. Its maximum speed under optimum conditions is 5 miles per hours.

The Transtainer's design enables it to travel through narrow lanes separating container stacks. Because of the dimensions of the crane and given the stacks of containers, the operator at ITS could observe the path of the wheels

on only one side when the crane was in motion. A signalman was supposed to act as observer on the ground when a container was lifted from or placed on a chassis and would act as a lookout when the crane moved down the aisleway from one row to another. If the signalman (or anyone else) were to observe anything requiring the Transtainer to stop, he could communicate with the operator by use of an intercom on the Transtainer or, in an emergency, hit one of the emergency stop buttons on either side of the Transtainer.

It is this job as signalman that Respondent, 63 year old William Smith, had performed for several years at ITS.

On March 25, 1980, Smith was injured in Container Row C. Container Row C had a series of spaced lampposts along one side; to prevent anything from striking the lampposts, each was barricaded by a row of brightly painted metal stanchions from 3.5 to 5 feet tall. This meant that in the vicinity of a lamppost the aisle clearances were slightly narrower, an obvious fact known to Smith and the other yard workers.

The ITS yard was laid out with a roadway perpendicular to Row C. The rule was that a Transtainer operator would not cross the intersection without the assistance of a signalman because of possible cross traffic. Some 14 feet north of the intersection on Row C was a lamppost, with its row of four protective stanchions extending roughly six feet on either side of the lamppost.

There was a ladder on the side of the Transtainer to enable the operator to reach the overhead cab and also to

afford access to the diesel engine platform. Smith said he and other workers were in the habit of riding on the ladder when the Transtainer was in motion, although this was contrary to official company policy.

Smith gave two contradictory versions of how he was injured. At his deposition, he testified that he was on the Transtainer ladder before it got to the roadway intersection; the Transtainer crossed the intersection heading north. Smith, whose only function at this point was to watch for obstructions in the pathway, stated he was looking forward, knew the stanchions would narrow the clearance but did nothing and was struck by a stanchion as the Transtainer slowly moved past the lamppost. Inexplicably, however, he lay some six feet to the north of the northernmost of the stanchions.

At the time of trial Smith said he had preceded the Transtainer down Row C to the roadway intersection. He was talking with a signalman from an adjacent row. He stated the Transtainer stopped at the intersection, and he waved the operator to proceed through the intersection. Smith claimed that as the Transtainer moved forward, he ran around to the other side of the Transtainer, hopped onto the ladder for no particular reason and was then instantly struck by one of the stanchions.[1]

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[1] One expert took this version of Smith's testimony, the dimensions and speed of the Transtainer, the distances it would have traveled while Smith was running, etc., and showed without contradiction that Smith could not even have caught up with the ladder on the far side of the Transtainer until it was already far past the lampost and stanchions.

Smith's injuries were not caused by impact with a stanchion. In fact, the injuries were consistent with Smith's simply falling or jumping off the ladder.

Smith claimed Paceco should be held liable on the theories that the Transtainer was negligently or defectively designed.

B. Summary Of Procedural History.

After lengthy deliberations, the jury returned special verdicts (1) unanimously finding the City of Long Beach was responsible for a dangerous condition of property, but the condition was not dangerous when used with due care, (2) unanimously finding ITS was negligent and responsible for 70% of plaintiff's injuries, (3) unanimously finding Smith was negligent and responsible for 25% of his injuries, and (4) finding by a vote of 9 to 3 that the Transtainer was negligently and defectively designed, and allocating responsibility for 5% of plaintiff's injuries to Paceco.

The jury awarded total damages of $705,143. The sum was reduced for purposes of judgment by the amount of plaintiffs' comparative fault. Paceco sought a setoff in the amount of compensation payments made on behalf of ITS. ITS' compensation carrier (Tokio Marine and Fire Insurance Company, Ltd.) objected, contending the question was governed by federal maritime law and the Longshoreman and Harbor Workers' Compensation Act, and no setoff was permissible. The trial court agreed. Thus despite the jury's belief and intention that Paceco would pay only 5% of the damages, it was held responsible for 75% of the damages, almost $529,000.

Paceco appealed, inter alia, challenging the constitutionality of California's non-statutory scheme of joint and several liability and comparative fault (see *American Motorcycle Assn. v. Superior Court* (1978) 20Cal.3d 578) both in general and as it intersects with employer compensation schemes like the LHWCA.

These constitutional arguments were supported in amicus curiae briefs filed on behalf of The Association for California Tort Reform, The California Chamber of Commerce and The Association of California Insurance Companies, (on one brief) and The California Manufacturers Association.

The Court of Appeal rejected these arguments and affirmed the judgment in an unpublished opinion. No rehearing was sought. Paceco's petition for review by the California Supreme Court was ultimately denied.

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REASONS FOR GRANTING REVIEW

I.

STATE TORT LAW HAS BECOME A MEANS OF REDISTRIBUTING WEALTH WITHOUT REGARD TO CONSTITUTIONAL CONSTRAINTS.

When this case was argued before the California Court of Appeal, the justice who later authored the opinion observed that the judgment almost shocks the conscience. There is no "almost" about it. For a marginal defen-

dant[2], a defendant whose own fault is one-fifth that of the plaintiff to be required to pay 75 percent of all damages—70 percent of which are attributable to the plaintiff's employer, for which statutory compensation is paid —is shocking.

Tort law has moved far from its common law origins. Indeed, it has become a self-conscious tool of social engineering for use by legislatures and courts. Rules treating negligent plaintiffs differently from negligent defendants and rules of "deep pocket" liability are simply tools of social engineering, means of redistributing wealth by taking from the rich and giving to the poor. Thus far these rules have escaped constitutional analysis.

There is no reason a state should be able to use its tort law to arbitrarily take private property from one party and give it to another. There is no essential difference between this and rent control regulations requiring property owners to subsidize their tenants by prohibiting rent increases because of tenants' economic hardship. (See *Pennell v. City of San Jose,* No. 86-753, appeal pending). The same notion of forcing an individual to bear a public burden is at work here as in the case of rules requiring a property owner to contribute a portion of his property to public use. (See *Nollan v. California Coastal Commission,* No. 86-133, appeal pending.)

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[2] One scholar has observed that "[i]f a situation arose where one tortfeasor's culpable conduct was only five percent of the total picture, a very strong defense argument could be made that that individual's act was not a cause at all, thereby avoiding the whole concept of joint and several liability." (Schwartz, *Li v. Yellow Cab Company: A Survey of California Practice Under Comparative Negligence* (1976) 7 Pacific L.J. 747, 764.)

It is no coincidence that California is the source of so many different ways of placing public burdens on private shoulders but it is far from alone in this pattern. The question is whether tort law, when used in this fashion is immune from those constitutional principles which clearly govern other measures accomplishing the same end. It cannot be, for several related reasons under the Fifth and Fourteenth Amendments.

The common law rule of joint and several liability, i.e., liability for entire damages, makes sense in the case of true joint tortfeasors; where persons have acted in concert, the act of each may fairly be treated as the act of all participants in the common enterprise. (See Prosser, *Joint Torts and Several Liability* (1937) 25 Cal.L.Rev. 413.) The term "joint tortfeasors," however, unfortunately has come to be used to refer to all persons who, under liberalized rules of procedure, could be joined as defendants whether they are truly joint, concurrent or successive tortfeasors. Thus, confusing true joint tortfeasors with procedurally joint defendants, the common law imposed liability on a joint and several basis in any case where the act of more than one defendant contributed to produce an injury to the plaintiff which was regarded as legally "indivisible." As stated in *Finnegan v. Royal Realty Co.* (1950) 35 Cal.2d 409, 433: "Even though persons are not acting in concert, if the result produced by their acts is indivisible, each person is held liable for the whole."

Even accepting arguendo the validity of this concept of indivisibility, a rule imposing entire liability on each of the so-called joint tortfeasors is not a necessary ac-

companiment. If more than one person contributed to an indivisible injury, pro rata liability is, in the abstract at least, as logical a rule as joint and several liability. It must be remembered, however, that both the tools and the moral tone of the common law were very different over the past several hundred years and this was reflected in a number of "all or nothing" principles. Just as a plaintiff contributorily at fault to any degree for an injury to himself was barred from all recovery, so a tortfeasor contributing to an indivisible injury was deemed liable for the whole; similarly, a tortfeasor who had satisfied the entire liability to a plaintiff whose injury was caused by the acts of more than one tortfeasor could not obtain contribution from any other tortfeasor. (See Prosser and Keeton on Torts (5th ed. 1984) sec. 50, p. 336.)

The rough symmetry of the common law's all or nothing rules has been replaced in California, as in many other states, with a system of pure comparative fault: "[T]he 'all or nothing' rule of contributory negligence as it presently exists in this state should be and is herewith superseded by a system of 'pure' comparative negligence, the fundamental purpose of which shall be to assign responsibility and liability in direct proportion to the amount of negligence of each of the parties." (*Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 828-829.)

The California Supreme Court has also held, however, in *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, that the common law rule of joint and several liability of concurrent tortfeasors remains the law of this state despite the adoption of a rule of pure comparative negligence. The California Supreme Court

has thus created an unconstitutional anomaly.[3] The anomaly appears most clearly in cases where the plaintiff is contributorily at fault and one of the defendants is judgment-proof or otherwise not answerable for damages in proportion to his fault. In such circumstances the plaintiff's recovery is reduced solely by his own percentage of fault, i.e., his fault translates directly into liability (in the form of a reduction of the judgment) in proportion to fault. The deep pocket defendant, however, is the victim of the *American Motorcycle* anomaly—his liability bears no relation to his fault; rather, he is liable for all damages other than those attributable to the plaintiff's percentage of fault.

The equal protection clause of the Fourteenth Amendment requires that a state's laws operate even-handedly. Where the law imposes greater burdens on or denies benefits to some persons while similarly circumstanced persons are free of such burdens or enjoy such benefits, the minimum justification required of such differential treatment is a showing that it furthers a legitimate state purpose in a rational and permissible fashion. (E.g., *Metropolitan Life Insurance Co. v. Ward* (1985) 470 U.S. 869.) "The term 'rational,' of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class." (*City of Cleburne v. Cleburne Living Center* (1985) 473 U.S. 432, 105 S.Ct. 3249, 3261 (Stevens,

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[3] Court-made rules are, of course, subject to the same constitutional constraints as statutes. (See, e.g., *New York Times Co. v. Sullivan* (1964) 376 U.S. 254.)

J. concurring).) The difference in the manner of treating negligent plaintiffs and negligent defendants under California's rule of joint and several liability does not survive equal protection (or, as we later explain, substantive due process) analysis.

Every effort to articulate a principled basis for differentiating between the consequences of a defendant's fault and that of the plaintiff necessarily fails. There is simply no rational quantitative or qualitative distinction.

Even sympathetic commentators have concluded "there is no reason, compatible with the *Li* rationale, why a defendant should bear a share disproportionately larger to his fault than a contributorily negligent plaintiff merely because a co-defendant is unable to pay his own full share." (Fleming, *Report to the Joint Committee of the California Legislature On Tort Liability on the Problems Associated With American Motorcycle Association v. Superior Court* (1979) 30 Hastings L.J. 1465, 1492.)

It is indeed startling in the final quarter of the twentieth century to find that plaintiffs as a class have a greater claim upon a court's sympathy than defendants. Fairness dictates that the blameworthiness of all actors in an accident be treated on a consistent basis. (*Bartlett v. New Mexico Welding Supply, Inc.* (App. 1982) 98 N.M. 152, 646 P.2d 579; Adler, *Allocation of Responsibility After American Motorcycle Association v. Superior Court* (1978) 6 Pepperdine L.Rev. 1, 14-15.)

Just as equal protection considerations condemn treating deep pocket defendants differently from negligent plaintiffs, principles of substantive due process of law

equally require that the common law rule of joint and several liability yield to fundamental fairness.

Take a case not dissimilar to this one; assume the plaintiff's employer has paid $100,000 in workers' compensation benefits and is 70 percent at fault, and defendant is 5 percent at fault and an involvent defendant is 25 percent at fault and there is a $1 million judgment. Why should the 5 percent defendant be liable for the entire judgment (offset only by workers' compensation payments),[4] of $900,000 when a jury has determined that his proportionate share equals only $50,000? The shield protecting the employer from liability except for the amount of statutory compensation payments is erected for the mutual benefit of employer and employee. If it is for their benefit, or even for the benefit of society at large, on what rational basis can it be maintained that they should have the benefit while the 5 percent defendant pays the price of the system by covering the difference between the employer's liability in proportion to fault and the sum paid in workers' compensation benefits—$600,000 in this illustration?

Consider also the insolvent (or otherwise shielded) defendant, whose liability should be $250,000. Although it is common to speak of the insolvent or judgment-proof defendant as immune from liability, this characterization masks social judgments of a kind similar to those involved in the workers' compensation setting. A person is judgment-proof only because society has chosen to restrict the means in which he is required to compensate another for

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[4] Obviously the hypothetical situation is substantially worsened if there is no offset for statutory compensation payments, as occurred here.

the consequences of his wrongful conduct. Thus the bankruptcy laws may protect clothing, housing, tools of the trade, a vehicle and other property which could be sued to satisfy a judgment. A person without property could be required to work off his debt, be imprisoned for debt or, as in ancient times, suffer physical punishment as a means of compensating the plaintiff.

Society has determined that adequate compensation for the plaintiff's injuries does not include these possibilities. Yet, to impose the price of this social judgment entirely on a 5 percent tortfeasor whose conduct happens to have coincided with that of an insolvent defendant is wholly arbitrary and unfair. If the sole defendant were insolvent, the loss he caused would be borne either by the plaintiff or by society directly (in the form of disability compensation, social security payments or the like). "Between one plaintiff and one defendant, the plaintiff bears the risk of the defendant being insolvent; on what basis does the risk shift if there are two defendants, and one is insolvent?" (*Bartlett v. New Mexico Welding Supply, Inc.*, *supra*, 646 P.2d 579, 585.) While society may not be required to shift the loss from the plaintiff in the first place, if it opts for some loss-shifting mechanism, that mechanism must be rational and fundamentally fair. It is fundamentally unfair, arbitrary and irrational to shift the cost of society's decision to protect one tortfeasor from the consequences of his conduct to a person who is fortuitously his co-defendant.

As the Supreme Court of Kansas stated in *Brown v. Keill* (1978) 224 Kan. 195, 580 P.2d 867, 874:

> "There is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there

> is no social policy that should compel defendants to pay more than their fair share of the loss. Plaintiffs now take the parties as they find them. If one of the parties at fault happens to be a spouse or a governmental agency and if by reason of some competing social policy the plaintiff cannot receive payment for his injuries from the spouse or agency, there is no compelling social policy which requires the defendant to pay more than his fair share of the loss. The same is true if one of the defendants is wealthy and the other is not."

Society may not arbitrarily shift costs from itself to an individual, or from one individual to another: "The Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." (*Armstrong v. United States* (1960) 364 U.S. 40, 49; *Webb's Fabulous Pharmacies, Inc. v. Beckwith* (1980) 449 U.S. 155, 163.) And the Fifth Amendment equally proscribes the taking of private property for a purely private purpose. (See, e.g., *Hawaii Housing Authority v. Midkiff* (1984) 467 U.S. 229, 104 S.Ct. 2321, 2330.)

As one commentator aptly observes:

> "If the law is supposed to mirror man's concept of fairness, perhaps no law is more at odds with this concept than the law of joint and several liability. What man on the street would accept as 'just' a rule which can allow one party to be compelled to pay more than its fair share of plaintiff's damages, while allowing a more blameworthy party to go scot free?" (Kaplan, *From Contribution to Good Faith Settlements: Equity Where Are You?* (1984) J. of Air Law and Commerce 771, 722.)

California's rule of joint and several liability as applied to concurrent tortfeasors is a fundamentally irrational, unfair and indefensible loss-shifting mechanism. If society deems it necessary to shift a plaintiff's loss away from him and still shield some wrongdoers from liability in proportion to fault, the cost of those social decisions must, in fairness and justice, be borne by society itself.

II.

TO COMPEL A THIRD PARTY DEFENDANT TO PAY FOR THE NEGLIGENCE OF AN EMPLOYER WITHOUT CREDIT FOR COMPENSATION PAYMENTS FRUSTRATES CONGRESSIONAL INTENT, OFFENDS FIFTH AMENDMENT PRINCIPLES AND BOTH COMPOUNDS AND MAGNIFIES THE FUNDAMENTAL UNFAIRNESS OF STATE TORT LAW.

As in the instant case, California courts have interpreted federal decisions under the Longshoremen's and Harbor Workers' Compensation Act to deny a third party tortfeasor credit against the judgment for compensation payments made by a negligent employer. (See *Schreefel v. Okuly* (1983) 143 Cal.App.3d 818.) This is a rather amazing result for a statutory scheme whose intent was to make the employer's liability absolute but exclusive. By denying credit against the judgment for compensation payments and requiring a third party to pay the full judgment, out of which the employer (or its insurer) will be reimbursed for compensation payments relieves the employer of any obligation despite its fault. The fact the employer's liability is limited by the Act, which must be construed to prevent actions for contribution or indemnity

that would render this limitation meaningless (see *Edmonds v. Compagnie Generale Transatlantique* (1979) 443 U.S. 256), does not also mean the employer should be reimbursed by a third party unfortunate enough to be caught in the web of joint and several liability with an employer under the Act.

Applied as in this case the Act confers a windfall at the expense of a third party whose "fault" was a fraction of that of both employer and employee—without rhyme or reason. This case illustrates the pernicious and indefensible results of the intersection of the LHWCA, a non-fault compensation scheme, with state tort law, a fault-based scheme.

The employer has been legislatively determined to be the proper party to distribute the costs of his enterprise. When the compensation scheme is translated into a fault-based system of joint and several liability, these costs are magnified and then imposed on a third party who, if able to distribute them at all, does so outside the business of the employer which should bear them. The third party's wealth is thus re-distributed not only to the plaintiff but to his employer as well.

When all is said and done, the process looks exactly like legalized robbery. The property of Paceco, Inc. is taken and redistributed to William Smith and his employer who between them are responsible for 95 percent of the damages. Unless conscience is wholly jaded, it must be shocked.

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CONCLUSION

For all the reasons stated, we respectfully pray that this Court will grant review.

Respectfully submitted,

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NOT FOR PUBLICATION

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

WILLIAM SMITH,	)	
	)	
Plaintiff and Respondent,	)	2 CIVIL
	)	NO. B009905
v.	)	(Super.Ct.
	)	No.SOC59218)
PACECO INCORPORATED,	)	
	)	(Filed Dec. 4, 1986)
Defendant and Appellant.	)	
	)	

APPEAL from a judgment of the Superior Court of Los Angeles County. Hon. Carrol M. Dunnum, Judge. Affirmed.

Kirtland & Packard and William T. Delhagen and Grienes, Martin, Stein & Richland and Alan G. Martin for Appellant.

Mitchell Levy for Respondent Smith.

Grancell, Grancell & Marshall and Douglas M. Marshall for Respondent Tokio Marine & Fire Ins. Co.

Defendant/appellant Paceco, Inc. (appellant) appeals from a judgment entered agains it after a jury trial.[1]

FACTS:

International Transportation Service ("ITS") operated a container storage facility under an arrangement

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1. The City of Long Beach Harbor Department, was also a defendant. It was subsequently found not liable for any of the injuries sustained by plaintiff/respondent.

with the City of Long Beach whereby ITS held the property under "preferential berth assignment." The City had laid out and constructed the facility to conform to ITS' specifications. ITS stored containers (40 feet long and 13 feet high) used for long distance freight transportation. These containers typically are shipped by boat and placed directly on a truck chassis for delivery. At ITS the containers are lifted from the truck chassis and stacked three high in rows of six. The crane used by ITS to lift these containers is called a transtainer, designed and manufactured by appellant.

The transtainer is a huge crane, weighing almost 100 tons, with wheels 80 feet apart from side to side and 30 feet from front to back; it is capable of lifting 40 tons and can stack containers four high. Its primary purpose is to stack and unstack containers in the yard. Its maximum speed is five miles per hour. At ITS, the transtainer moves along parallel, narrow aisleways between columns of containers, straddling containers to stack them as they are removed from the chassis or to retrieve them from the stacks.

The operator's cab is on a trolley about 40 feet off the ground. Due to the dimensions of the transtainer, the operator's view is obstructed on one side. Because of this blind side, it has become industry practice to have a signalman work with the operator when the transtainer is in motion. The signalman acts as an observer on the ground while a container is being lifted from or placed on a chassis and acts as a lookout when the transtainer moves down the aisleway from one row to another. The trainstainer generates a tremendous amount of noise. To facilitate com-

munication between the signalman and the operator, the transtainer has an intercom on the blind side, about five feet off the ground. There is also an emergency button on either side of the transtainer which when activated cuts off all electrical power and sets all brakes, causing an immediate slow down and halt.

Adjacent to the intercom and emergency button on the blind side is a ladder used by the operator to reach the cab and by repairman who need to service the transtainer's diesel engine. This ladder protrudes some 2½ feet from the transtainer's side. There was trial testimony that the signalman at ITS were in the habit of riding the ladder down the aisleways between intersections. However, there was also testimony from the ITS Executive Vice President in Charge of Operations that he had never seen any signalman riding a transtainer; and if he had, he would have taken action to insure the signalman would not do so again.

Plaintiff/respondent William Smith (respondent), at age 63, was a longshoreman assigned to work for ITS as a transtainer signalman. On March 25, 1980, he was riding on the ladder of a transtainer as, he testified, his foreman ordered him to do. This particular transtainer was working down Container Row C which had a series of spaced lampposts along one side. To prevent anything from striking these posts, each was protected by a row of brightly painted metal stanchions, from 3.5 to 5 feet tall and filled with concrete. Respondent testified that on this date he had returned from lunch and was standing talking to coworkers when he heard the transtainer bell. This was the signal from the operator that he was about to move the transtainer. Respondent ran around the transtainer and

jumped on the ladder. Almost immediately he "felt a lick" on his legs and fell off the transtainer. He testified he had been hit by the stanchions causing him to fall and sustain severe injuries.

PROCEDURAL HISTORY:

Respondent filed suit against the City of Long Beach Harbor Department and against appellant. The causes of action against appellant were grounded on negligence and on strict product liability for design defect. The negligence consisted of appellant's design of the transtainer and its failure to warn a signalman of the danger of riding the ladder. The alleged design defect was the placement of the ladder in such close proximity to the intercom and emergency button as to tempt the signalman to hitch a ride on the moving transtainer.

The trial lasted nine days and included the reading of seven lengthy depositions to the jury. On August 10, 1984, by special verdict, the jury found that the City was not at fault; ITS was 70 percent at fault;[2] respondent was 5 percent at fault; and appellant 20 percent at fault. The jury awarded $705,143 to respondent. After deducting the requisite amount attributable to appellant's negligence, the court ordered respondent to pay appellant $528,857.25 with interest. Shortly thereafter, appellant filed a motion to correct error in judgment pursuant to Code of Civil Procedure section 473. Appellant argued that California's

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2. Because ITS is ruled and covered by Federal Longshoreman's & Harbor Workers' Compensation Act, it had not been a party to the suit nor was it required to pay any part of this judgment.

comparative negligence rules require that the judgment be offset by the amount of workers' compensation already paid to respondent by ITS. The court denied this motion ruling that the Longshoreman & Harbor Workers' Compensation Act, section 905 and maritime case law prohibit application of California's comparative fault rules as well as any form of indemnity.

Appellant also moved for judgment notwithstanding the verdict and for a new trial. These motions were also denied.

Appellant's contentions on appeal are: (1) There is no substantial evidence to support the judgment; (2) the court prejudicially erred in giving the jury instructions; (3) the misconduct of the jury foreman requires reversal; (4) the damage award was excessive, and the court erred when it failed to reduce the judgment by the amount of workers' compensation benefits paid to respondent and (5) California's common law rule of joint and several liability is unconstitutional because it denies appellant substantive due process and equal protection of the law. Though we sympathize with the plight of appellant who, though found only 5 percent liable for respondent's injuries, must pay 75 percent of the jury award, the law we are sworn to uphold and the governing rules of appellate review compel our affirmance of the judgment.

DISCUSSION:

1. *Substantial Evidence.* Appellant asserts substantial evidence is lacking to support the jury's conclusion that the transtainer was negligently or defectively designed or that any alleged defect was a substantial factor

in causing the accident. Specifically, appellant argues that respondent's trial testimony contradicted his deposition testimony and that the expert offered by respondent was without qualifications. In addition, appellant contends that any failure to warn does not constitute a product defect; that it had no duty to warn of the obvious danger of riding the ladder in a confined space; that, in any event, it owed no duty to warn to respondent.

"In reviewing the evidence on . . . appeal all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary, but often overlooked principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions. (Citations.)" (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.) Keeping these long-established guidelines in mind, we have reviewed the evidence before us and find that the requisite substantial evidence exists to support the judgment.

a. *Respondent's Inconsistent Statements.* We have read the trial transcript and noted the inconsistencies between respondent's trial and deposition testimony. At his deposition, respondent testified he was on the transtainer ladder before it got to the intersection and was not clear whether he had checked the intersection. At trial, he said he was standing in the intersection and waved the operator through, ran around the transtainer, jumped

on the ladder, and was hit by the stanchion. The jury was cognizant of these irregularities but nonetheless found respondent's credibility sufficient to find in his favor. Respondent was 63 when the accident occurred and 67 at trial and seemed to suffer from a faulty recollection. He was extensively cross-examined by appellant, and the inconsistencies in his testimony brought to the attention of the jury. To reject the jury's conclusion would necessitate our reweighing the evidence and respondent's credibility. These functions lie solely within the purview of the trier of fact, unless, of course, respondent's statements were inherently improbable. (*People v. Perrin* (1967) 247 Cal.App.2d 838, 844.) We cannot say, as a matter of law, that such was the case here. His changed story does not make inherently improbable his claim that his injuries were caused when he fell after having been hit by the stanchions.

b. *The Expert Witness.* Appellant registered strong objections with the court regarding the admissibility of the deposition of Mark Geddis (Geddis), respondent's expert witness. Appellant contended that Geddis lacked any qualifications as an expert in the area of transtainer use.

Geddis had been deposed by appellant and the City. He had consulted with respondent's counsel on whether any unsafe conditions caused respondent's injuries. He had concluded that placement of the ladder in close proximity to the intercom and emergency button was a foreseeably dangerous design defect and that there were inadequate operating instructions in the transtainer manual because it lacked any warning about the dangers of riding the ladder. He further concluded that respondent's injuries could have been caused any one of three ways: (1)

Respondent being struck by a stanchion; (2) respondent being caught by a stanchion; or (3) respondent falling from the transtainer ladder. He gave no greater weight to any one of these possibilities.

"[T]he question whether a witness qualifies as an expert is a matter addressed in the first instance to the sound discretion of the trial court." (*Brown v. Colm* (1974) 11 Cal.3d 639, 646-647.) The modern trend is toward more readily permitting admissibility of expert testimony. "The determinative issue in each case must be whether the witness has sufficient skill or experience in the field so that his testimony would be likely to assist the jury in the search for the truth, and no hard and fast rule can be laid down which would be applicable in every circumstance." (*Brown*, at p. 645.)

Before Gaddis' deposition was read to the jury, a hearing was held on its admissibility as expert testimony. Appellant objected to Geddis' offering his opinion regarding what was needed to enable a signalman to perform properly; the transtainer design; the necessity for instructions in the operator's manual about cargo handling; the lack of warning in the instruction manual. To each of these objections, the court responded that Geddis' education and experience met the threshold test of general testimonial qualification. It further commented that the varying degrees of Geddis' knowledge went to his credibility and the weight to be given his testimony by the jury.

Geddis had a degree in mechanical engineering and for 11 years had worked for Snyder Research Laboratories, Inc. as consulting engineer, investigating product de-

fects, explosions, and fires and had performed accident reconstruction, fault tracing and failure analysis for insurance companies. Given this background and the wide latitude given a trial court in accepting the qualifications of an expert (*Brown v. Colm, supra;* Evid. Code, § 460), we find no error in the court's determination. We note that during a vigorous cross-examination, which was also read to the jury, appellant challenged Geddis' expertise. Again, at closing argument, appellant sharply attacked Geddis' experience level. Moreover, in addition to appellant offering its own expert witness to counter some of Geddis' findings, the court instructed the jury fully regarding its prerogative either to accept or reject any expert testimony. We find no error.

c. *Product Defect and Duty to Warn.* Appellant's contentions about lack of substantial evidence regarding the design defect and whether failure to warn constitutes a design defect is premised on its assertion that Geddis lacked qualifications to proffer an expert opinion. We have determined above that the court was correct in allowing Geddis to testify as an expert.

Alternatively, however, appellant avers that there is no duty to warn against an obvious danger and that riding on the transtainer ladder in a confined space is just such a danger. Moreover, even if appellant had a duty to warn against this danger, it was not owed to respondent. We do not agree.

Luque v. McLee (1972) 8 Cal.3d 136, 144-145, in detail, discusses the various policy considerations which underlie the doctrine of strict liability for defect in product design and which have led our highest court to reject the latest-

patent defect distinction. Appellant's assertion fails because *Luque,* at page 144, concluded that the obviousness of the peril does not preclude liability.

We also conclude that appellant did have a duty to warn respondent. Evidence was offered that use of a signalman to assist the transtainer operator had become standard practice in the industry and that both California and federal OSHA standards requiring use of a signalman were known to appellant. There was support for the jury's conclusion that appellant should have foreseen the use of signalmen and that the location of the ladder would tempt the signalman to ride the transtainer.

2. *Jury Instructions.* Appellant contends the court prejudicially erred when, at respondent's request, it instructed the jury pursuant to BAJI 3.40. It states, "When a person's lawful employment requires that he work in a dangerous location or a place that involves unusual possibilities of injury, or requires that in the line of his duty he take risks which ordinarily a reasonably prudent person would avoid, the necessities of such a situation, insofar as they limit the caution he can take for his own safety, lessen the amount of caution required of him by law in the exercise of ordinary care." Appellant argues that the rule underlying this instruction applies only where the nature of the job requires exposure to dangerous circumstances, not where a plaintiff chooses to perform an otherwise safe task in a dangerous manner. We cannot agree.

"[A] litigant is entitled to instructions on every theory advanced by him which finds support in the evidence. (Citations.)" (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 543.) We conclude that sufficient evidence

of the danger inherent in respondent's workplace and job was presented to the jury to warrant the giving of this instruction. Respondent was assigned to work in a narrowly confined space and in close proximity to the transtainer, a crane of huge dimensions, weighing, almost 100 tons. Appellant itself through the deposition of Charles H. Ziveifel, Assistant to President and Director of Engineering & Quality Assurance, concluded that the transtainer "at any speed at all [could] cause an awful lot of damage, both to itself or to whatever it hits." Respondent's job required him to walk alongside this moving behemoth, at all times ready to push the emergency button or to use the intercom at a second's notice. Clearly, this situation falls within the definition of the "dangerous location" envisioned by BAJI 3.40.

3. *Juror Misconduct.* One of the grounds upon which appellant sought a new trial was juror misconduct. Included in its moving papers were declarations by two jurors which revealed that the jury foreman had informed the jury of a fatal accident involving a coworker which occurred at his workplace. In that case, some safety latches had been removed from a door which caused an electrical defect, and the workman was electrocuted. The foreman related that no warning signs had been posted and the manufacturer had been held liable. Appellant contends this conduct was especially prejudicial since the vote to find it liable was 9-3.

In opposition to the motion, appellant submitted declarations from the foreman and a second declaration from one of appellant's declarants. The foreman admitted making the remarks, but characterized them as made "in passing" in the context of a social discussion; that no

allusion to this incident was made during formal deliberations. Appellant's declarant clarified her earlier declaration by stating that the foreman's statement had been made in passing and there was no further discussion of it by the jurors; and she herself had pointed out to the jury that the two incidents should not be compared.

Whether or not to grant a motion for a new trial is within the sound discretion of the trial court. Its determination will not be disturbed unless "a manifest and unmistakable abuse of discretion clearly appears." (*Jiminez v. Sears Roebuck & Co.* (1971) 4 Cal.3d 379, 387.) When juror misconduct is a ground for a motion for new trial which is denied, a finding that the court determined the misconduct did not result in prejudice is implied. (*Andrews v. County of Orange* (1982) 130 Cal.App.3d 944, 954.) In the instant case, the court acted within its discretion. The counter affidavits filed by respondent, especially the clarifying declaration of appellant's declarant, sufficiently rebutted the presumption of prejudice. The case cited by appellant finding prejudicial juror misconduct involved situations distinctly different from the one at hand. Here the foreman did not discuss injuries he himself sustained and did not seek out his knowledge of the workplace incident; the product in the foreman workplace had no relationship to the product before the jury; the defendant had no relationship to the defendant before the jury; moreover, the affidavits reveal the remark was not taken into consideration by the jury. (See *Stark v. City of Los Angeles* (1985) 168 Cal.App.3d 276, 288-289.) Accordingly the court acted within its discretion when it denied the motion for new trial on the grounds of juror misconduct.

4. *Excessive damages.* An award of damages may be overturned " . . . only if the award is excessive as a matter of law or if after reviewing the record favorably to the judgment, we conclude that the award is so grossly disproportionate to the harm suffered as to raise the presumption that it resulted from passion or prejudice. (Citations.)" (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 419.) We simply cannot find that the award here is excessive or evidence that it resulted from passion and prejudice.

Respondent, after adjustment for his comparative negligence, was awarded $529,000.[3] To the date of trial, medical expenses incurred exceeded $84,000. Annual medical expenses were expected to follow. Plaintiff was earning $24,000 a year in 1980. He had been unable to work since the accident, and unable to continue to earn wages. He had not worked for four years, and it was not expected that he would be able to return to work in the future. He had four surgeries, endured severe pain and suffering, and experienced constant pain at the time of trial, four years after the accident. It was not expected that his condition would improve. He had lost his ability to hold his foot straight, could not walk without a brace, and a cane, nor for any distance longer than a block. He was righthanded, but had lost the normal use of three fingers in that hand, did not have a good grip and could not close his hand. He had loss of sensation, restricted motion, and permanent nerve damage. These facts support our conclusion that the award was not excessive.

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3. Of this, $156,596 is earmarked to satisfy the employer's LHWCA lien, leaving $373,000.

Appellant urges that the court erroneously refused to reduce the judgment by the amount of workers' compensation benefits received by respondent ($156,596.71). Response to this assertion is made by Tokio Marine & Fire Ins. Co., the workers' compensation carrier (carrier). Appellant contends that the rule of *Witt v. Jackson* (1961) 57 Cal.2d 57, is controlling. The *Witt* court held that a third party tortfeasor " . . . is entitled to have the judgment against him reduced by the amount of compensation paid to the injured employee if he can prove that the concurrent negligence of the employer contributed to the injuries suffered by the employee." (*ibid.* at p. 71.) Appellant made this argument to the court below when it made its motion to correct error in judgment form. The trial court denied the motion, ruling that federal and maritime case law prohibit application of California's comparative fault rules as well as any form of indemnity.

Appellant now urges that federal law does not apply because nowhere below did respondent show his workers' compensation benefits were being paid pursuant to LHWCA. The argument is, as follows: Carrier originally filed a complaint in intervention, asserting payments under LHWCA which it abandoned when appellant's answer asserted the rule of *Witt v. Jackson.* Then, carrier filed a notice of lien under *California law* and failed to allege in the notice of lien payment of benefits pursuant to LHWCA. So, appellant asserts, carrier has waived its claim to rights under federal law, and the rule of *Witt* is controlling. In support of this proposition, appellant cites *Pason v. Westfal-Larson Co., Inc.* (9th Cir. 1974) 504 F.2d 1226.)

Appellant's reliance on *Pason v. Westfal-Larson Co., Inc.* is misplaced. *Pason* is clearly distinguishable. In *Pason,* the plaintiff, injured in 1966, filed a California state workers' compensation claim and an admiralty action and received compensation payments under the state statute. Here, respondent filed an action in state court and received voluntary compensation payments pursuant to the LHWCA. In *Pason,* the court based its denial of the employer's carrier's lien on the fact that *Witt v. Jackson* applied because compensation had been awarded under the state act, the carrier had failed to object to or challenge the jurisdiction of the state compensation board and, most importantly, that section of the LHWCA which carrier argues precludes such a reduction had not taken effect. (*Pason,* at p. 1228.) 33 U.S.C. section 905 is now controlling and, in pertinent part, it provides:

> "(a) The liability of an employer prescribed in Section 904 [compensation benefits and medical benefits] shall be exclusive and in place of all other liability of such employer to the employee, his legal respresentative, husband or wife, parents, dependents, next of kin and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, . . .
>
> "(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of Section 933 of this title and the *employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void.*" (Emphasis added.)

Federal case law has interpreted the language of this statute broadly. (See *Fitzgerald v. Compania Naviera La Molinera* (1974) 394 F.Supp. 402; *Spadola v. Viking Yacht Co.* (1977) 441 F.Supp. 798; *S.S. Seatrain Louisiana v. California Stevedore and Ballast Co.* (1976) 424 F.Supp. 180.) California courts have also acted to protect LHWCA employers from indemnification actions by "non-vessel" third parties. (*IT Corporation v. Superior Court* (1978) 83 Cal.App.3d 443, 449.) Where compensation payments are made directly under the LHWCA, California's comparative fault principles reducing an employer's compensation lien on its employee's third party judgment are inapplicable. (*Schreefel v. Okuly* (1983) 143 Cal.App.3d 818, 822.)

We find facile appellant's argument that because carrier failed to allege payment of benefits pursuant to LHWCA in its notice of lien, such payment has not been proven. The record indicates all parties knew respondent was a longshoreman and had received his workers' compensation payments pursuant to LHWCA.

Similarly without merit is appellant's argument that carrier waived its rights under federal law. Nowhere in the record is there evidence of a knowing waiver of these substantial rights.

5. *Joint & Several Liability.* Finally, we discuss appellant's argument regarding the unconstitutionality of California's rule of joint and several liability.

This court is bound by the doctrine of joint and severable liability articulated by our Supreme Court in *American Motorcycle Assoc. v. Superior Court* (1978) 20 Cal.3d 578, 590.) Though we are without power to nullify or

modify this rule, in June, 1986, the people acted to do so through the passage of the Fair Responsibility Act of 1986 (Prop. 51), now Civil Code section 1431.2, subdivision (a). This act purports to eliminate joint and severable liability for noneconomic damages and substitutes a rule of several liability only.

At appellant's request, we permitted the parties to submit supplemental briefs regarding the applicability of Prop. 51 to this case. Subsequently, the First Appellate District of our court filed *Russell v. Superior Court* (1986) 185 Cal.App.3d 810, petition for review denied October 30, 1986.

In *Russell,* plaintiff-petitioner was awaiting trial in an asbestos related personal injury action. The court held that Prop. 51 was not applicable to the case and may apply to cases which accrue on or after the effective date of the statute. (*Russell, supra,* at pp. 820-821.) It reasoned that in California both "procedural" and "substantive" statutes are subject to the presumption against retroactive effect (*ibid.* at p. 815); the presumption itself is subordinate to legislative intent (*ibid.* at p. 818); nothing in the initiative or ballot materials, or in the nature of the initiative itself revealed an intent for retroactivity. (*Ibid.* at pp. 818-819.)

Russell, supra, was dealing with a case awaiting trial. Here, the jury trial has been completed. Consequently, we reject appellant's arguments regarding the unconstitutionality of the rule of joint and several liability as it applies to this case.

The judgment is affirmed.

NOT FOR PUBLICATION

HASTINGS, J.

We concur:

ASHBY, Acting P.J.
EAGLESON, J.

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 5, No. B009905

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

IN BANK

WILLIAM SMITH, Respondent,

v.

PACECO INC., Appellant.

(Filed Feb. 25, 1987)

Appellant's petition for review DENIED.

LUCAS
Chief Justice